UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MANUEL DIAZ, Plaintiff, vs. RICHARD L. CARRIÓN JUAN J. BERMÚDEZ FRANCISCO M. REXACH, JR. MICHAEL J. MASIN MANUEL MORALES, JR. JOSÉ R. VIZCARRONDO MARÍA LUISA FERRÉ FREDERIC V. SALERNO WILLIAM J. TEUBER, JR. Defendants, -and- POPULAR, INC., Nominal Defendant.	)	Case No. 3:09-02025-CCC

PLAINTIFF'S MOTION AND MEMORANDUM IN SUPPORT FOR ATTORNEY FEES AND EXPENSES

Plaintiff Manual Díaz ("Díaz" or the "Plaintiff") derivatively on behalf of Nominal Defendant Popular, Inc. ("Popular" or the "Company"), respectfully submits this Motion and Memorandum in support for attorney fees and expenses incurred as a result of Defendants' erroneous removal of Plaintiff's shareholder derivative action to federal court. Defendants' arguments asserted to support removal were ill conceived with no factual or legal support and were simply wrong as a matter of law. Accordingly, the Court should grant Plaintiff's request for attorney fees and costs.

I. BACKGROUND

As a consequence of Defendants' wrongful removal, Plaintiff has been severely delayed in litigating this case on behalf of Popular. Plaintiff filed his shareholder derivative action ***over a year ago*** on October 5, 2009 in the Commonwealth of Puerto Rico, Court of First Instance, San Juan Superior Court. Since that time, Plaintiff has been forced to respond to Defendants' needlessly repetitious filings which attempted to create federal jurisdiction where none existed. On September 30, 2010, this Court granted Plaintiff's Motion to Remand (Dkt. No. 18) which noted that the Court's statement of reasons were to follow by separate Opinion and Order. On October 13, 2010 this Court issued a second order setting out its Statement of Reasons in Support of Remand Order (Dkt. No. 21) (the "October 13, 2010 Remand Order"), which provides the basis for the instant motion. Without waiting until the Court issued its separate Opinion and Order to review the Court's analysis and reasoning in granting Plaintiff's Motion to Remand, Defendants jumped the gun and filed an Informative Motion that noted their intent to file a motion to reconsider (Dkt. No. 19). It is unclear how Defendants could decide in good faith to burden this Court with additional filings without knowing the Court's analysis with respect to Plaintiff's Motion to Remand. Instead of being able to focus his efforts on aggressively litigating this action, Plaintiff will now be forced to respond to Defendants' anticipated motion to reconsider. This Court should not reward this type of gamesmanship that Defendants have continually engaged in and should grant Plaintiff's request for fees and costs.[1]

[1] Given that Defendants plan to file a motion to reconsider, Plaintiff is unable at this time to ascertain the total amount of fees and expenses incurred as a result of Defendants' wrongful removal. Thus, unless the Court requests otherwise, Plaintiff plans to file an affidavit setting forth in detail the total fees and expenses incurred at the conclusion of the briefing of Defendants' motion to reconsider.

II. DEFENDANTS HAD NO OBJECTIVE REASONABLE BASIS FOR REMOVAL AND PLAINTIFF SHOULD BE AWARDED ATTORNEY FEES AND COSTS

28 U.S.C. §1447(c) provides that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." Bad faith is not a necessary condition for an award of attorney fees incurred in obtaining remand under the statute providing that "order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). Even if Defendant's position in their Notice of Removal may be fairly supportable, which is not the case here, an award of attorney fees for wrongful removal is proper when removal is wrong as a matter of law. *Ford Motor Credit Co. of Puerto Rico, Inc. v. Caribe Ford Inc.*, 247 F. Supp. 2d 118, 120 (D. Puerto Rico 2003); *see also Trawick v. Asbury MS Gray-Daniels, LLC,* 244 F. Supp. 2d 697, 699 (S.D. Miss. 2003) ("Because the jurisdictional basis relied upon by Defendants in their Notice of Removal was fundamentally erroneous, Plaintiffs should be awarded the attorney's fees and costs incurred by them which directly relate to the removal and remand of this case.").

Indeed, Plaintiff is simply asking the Court to reimburse it for his unnecessary litigation expenses and costs incurred as a result of Defendants wrongful removal. As this Court has held before, the "fee award [] is not punitive;" "it simply reimburses plaintiffs for wholly unnecessary litigation costs inflicted by the defendants." *Ford Motor Credit Co. of Puerto Rico, Inc. v. Caribe Ford Inc.*, 247 F. Supp. 2d 118, 120 (D. Puerto Rico 2003). Thus, as noted *supra*, it is not necessary for this Court to find bad faith or improper purpose by the removing party in order to award fees and expenses. *Id.*

Here, Defendants' removal was improper as a matter of law. At the time of removal, Defendants had no objective reasonable legal grounds to believe removal was proper. As

Defendants were aware, Plaintiff is a citizen of Puerto Rico; thus, there was no diversity of citizenship present to support removal pursuant to 28 U.S.C. § 1332. Without being able to rely on diversity of citizenship as their basis for removal, Defendants attempted to create federal jurisdiction where none existed to support its wrongful removal of Plaintiff's state shareholder derivative action. As noted in the Court's October 13, 2010 Remand Order, "[t]he removing defendants make blanket references in their Notice of Removal to Popular "filings" with the Securities and Exchange Commission, without identifying any specific documents, other than a passing reference to a registration statement." *See*, October 13, 2010 Remand Order at 7. Ultimately, this Court held that:

> …federal law does not preempt the state law relied upon by plaintiff and that plaintiff's claim is neither necessarily federal in character, nor does it require resolution of a substantial federal question for plaintiff to obtain the relief requested. A finding that defendants violated federal securities law is not essential to the question of whether defendants breached their fiduciary duties which is what plaintiff predicates his claim on.

Id. at 11.

Contrary to Defendants' flawed arguments, the simple fact of the matter is that federal law is not and was not an essential element of any of the claims alleged by Plaintiff in this action; nor does Plaintiff's shareholder derivative action turn on any construction of federal law. None of Plaintiff's state causes of action stands or falls based on a particular interpretation or application of federal law. As noted by this Court, this case involves the application of state law governing the rights, duties and relationship of Popular and its officers and directors, i.e., matters concerning Popular's internal affairs. Thus, Defendants clearly had no objective reasonable basis for removal.

III. CONCLUSION

Accordingly, for the reasons set forth above, the instant Motion should be granted in its entirety and Plaintiff should be awarded fees and costs incurred as a result of Defendants' erroneous removal.

Dated: October 27, 2010

Respectfully submitted,

s/Jane Becker Whitaker
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CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2010 I filed the foregoing document with the Clerk of Courts using the CM/ECF system which will send email notification of such filing to all counsel of record as reflected on the service roster.

s/Jane Becker Whitaker
Jane Becker Whitaker